

SEA OIL MILL (1979) SDN BHD & ANOR

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v.

BANK KERJASAMA RAKYAT MALAYSIA BHD

COURT OF APPEAL, PUTRAJAYA

B

JAMES FOONG JCA

ZALEHA ZAHARI JCA

KN SEGARA JCA

[CIVIL APPEAL NO: W-02-298-2003]

28 AUGUST 2008

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CIVIL PROCEDURE: *Summary judgment - Loan facility under Islamic banking principles - Whether plaintiff could lawfully grant facility to defendant at material date - Whether triable issues raised*

The plaintiff granted the 1st defendant company an Al-Tarkhis facility under the Islamic banking principles of Bai Al-Inah. The 2nd defendant was the director of the 1st defendant and guarantor. The 1st defendant subsequently defaulted in the payments under the facility which led to the plaintiff's action against the defendants for summary judgment. The learned judge gave judgment for the plaintiff. The defendants now appealed.

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Held (allowing 2nd defendant's appeal)

Per KN Segara JCA delivering the judgment of the court:

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(1) There was a serious issue as to whether the plaintiff could lawfully grant the facility to the 1st defendant under Islamic banking principles in August 1997 when it was a co-operative society registered or deemed registered under the Co-operative Societies Act 1993. That was a question of fact and law that could only be decided after witnesses have given evidence on behalf of the plaintiff as to its capacity in law to carry on Islamic banking principles in August 1997. (para 11)

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(2) By virtue of s. 14(1)(g) of the Bank Kerjasama Rakyat Malaysia Berhad (Special Provisions) Act 1978, the plaintiff could only carry on business authorised by the relevant Minister with the concurrence of the Minister of Finance. Therefore, the triable issues for determination were (1) whether the Minister of Land and Co-operative Development obtained the concurrence of the Minister of Finance when he wrote the letter dated 4 December 2001 granting the plaintiff

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A permission to use syariah banking principles as the said letter
did not state so; and (2) whether the Minister's authorisation
was sufficient to legitimise a transaction by the plaintiff
executed in August 1997 or whether it rendered the Islamic
banking transaction with the defendants *ultra vires* the powers
B of the plaintiff and hence void and unenforceable. (paras 12,
13 & 14)

(3) The Development Financial Institutions Act 2002 which came
into operation on 15 February 2002 applied to financial
C institutions including the plaintiff. Section 129(1) of the said
Act prohibited a prescribed institution from carrying on any
Islamic banking business or Islamic financial business before
obtaining the prior written approval of the Central Bank of
Malaysia. As such, there were serious issues to be tried.
D (paras 16 & 17)

(4) Even if the approval of the Minister concerned was accepted,
a factual issue was required to be determined, *ie*, whether the
approval was intended to be effective retrospectively.
E Thereafter, the question would arise as to whether such
retrospective authorisation would be lawful in light of statutory
provisions governing the plaintiff as to when it could embark
on Islamic banking business. Also needed to be determined
was whether the plaintiff's Board of Directors specifically
F approved Islamic banking transactions by way of Al-Tarkhis
(Bai Al-Inah) at the meeting on 29 April 1993. That was a
matter of evidence to be adduced at the trial. It followed that
the present case was not a plain and obvious case that could
be disposed off in a summary manner. There were serious
G issues of fact and law to be determined. (paras 18 & 19)

*[The 1st defendant's appeal was struck off as it was not represented and
no leave of court was obtained in compliance with s. 226(3) Companies
Act 1965 to proceed with the appeal.]*

H **Bahasa Malaysia** Translation Of Headnotes

Plaintif memberikan defendant pertama syarikat kemudahan Al-
Rarkhis di bawah prinsip-prinsip perbankan Islam Bai Al-Inah.
Defendant kedua adalah direktor defendant pertama dan penjamin.
I Defendant pertama kemudiannya mungkir pembayaran di bawah
kemudahan tersebut yang membawa kepada tindakan plaintif

terhadap defendan bagi penghakiman terus. Hakim bicara memberi penghakiman memihak kepada plaintif. Defendan-defendan kini merayu.

Diputuskan (membenarkan rayuan defendan kedua)

Oleh KN Segara HMR menyampaikan penghakiman mahkamah:

- (1) Terdapat isu serius sama ada plaintif boleh memberikan kemudahan tersebut kepada defendan pertama di bawah prinsip-prinsip kebankan Islam pada bulan Ogos 1997 sedangkan plaintif sebuah pertubuhan koperasi yang didaftarkan atau disifatkan didaftarkan di bawah Akta Koperasi 1993. Isu tersebut adalah satu persoalan fakta dan undang-undang yang hanya boleh ditentukan selepas saksi-saksi telah memberi keterangan bagi pihak plaintif berkenaan keupayaan plaintif berurusan dalam prinsip-prinsip kebankan Islam pada bulan Ogos 1997.
- (2) Di bawah s. 14(1)(g) Akta Bank Kerjasama Rakyat Malaysia Berhad (Peruntukan Khas) 1978, plaintif hanya boleh menjalankan perniagaan yang dibenarkan oleh Menteri berkenaan dengan persetujuan Menteri Kewangan. Dengan itu, isu-isu bicara untuk ditentukan ialah (1) sama ada Menteri Pembangunan Koperasi dan Tanah mendapat persetujuan Menteri Kewangan apabila beliau menulis surat bertarikh 4 December 2001 memberikan plaintif kebenaran berurusan di bawah prinsip-prinsip kebankan syariah memandangkan surat tersebut tidak ternyata demikian; (2) sama ada kebenaran menteri tersebut memadai untuk mengesahkan transaksi plaintif yang dilaksanakan pada bulan Ogos 1997 atau sama ada kebenaran menteri tersebut menjadikan transaksi kebankan Islam dengan defendan-defendan *ultra vires* kuasa-kuasa plaintif seterusnya terbatal dan tidak boleh dikuatkuasakan.
- (3) Akta Institusi Kewangan Pembangunan 2002 yang mula berkuatkuasa pada 15 Februari 2002 terpakai kepada institusi-institusi kewangan termasuk plaintif. Seksyen 129(1) Akta tersebut melarang institusi-institusi tertentu menjalankan mana-mana urusan kebankan Islam tanpa mendapat kelulusan bertulis Bank Pusat Malaysia. Dengan itu, terdapat isu-isu serius yang perlu dibicarakan.

- A (4) Jikapun kebenaran menteri tersebut diterima, satu isu fakta
perlu ditentukan, iaitu, sama ada kelulusan tersebut berkesan
secara retrospektif. Selepas itu persoalan akan timbul sama ada
kebenaran tersebut sah di sisi undang-undang memandangkan
peruntukan-peruntukan statutori terpakai plaintif memutuskan
B bila plaintif boleh memulakan urusan kebankan Islam. Juga
patut ditentukan ialah sama ada Lembaga Pengarah plaintif
khususnya meluluskan transaksi-transaksi Al-Tarkhis (Bai Al-
Inah) dalam mesyuarat 29 April 1993. Isu itu melibatkan
C keterangan yang mesti dikemukakan di perbicaraan. Ia
mengikut bahawa kes semasa bukan sebuah kes jelas dan
ternyata untuk diselesaikan secara penghakiman terus.
Terdapat isu-isu fakta dan undang-undang yang serius yang
mesti ditentukan.

- D *[Rayuan defendan pertama terbatal kerana tiada diwakili dan tiada
kebenaran mahkamah diperolehi mengikut s. 226(3) Akta Syarikat 1965
bagi meneruskan rayuan.]*

Case(s) referred to:

- E *Lim Kar Bee v. Duofortis Properties (M) Sdn Bhd [1992] 3 CLJ 1667;
[1992] 1 CLJ (Rep) 173 SC (refd)*

Legislation referred to:

- Bank Kerjasama Rakyat Malaysia Berhad (Special Provisions) Act 1978,
ss. 2, 4(2), 14(1)(G)
F Companies Act 1965, s. 226(3)
Development Financial Institutions Act 2002, ss. 3, 129(1), 219

*For the appellants/defendants - Isa Aziz Ibrahim; M/s AI Nathan & Isa Aziz
Ibrahim*

- G *For the respondent/plaintiff - Khairuddin Abd Ghani; M/s Amir Ruhana &
Khairuddin*

[Appeal from High Court, Kuala Lumpur; Suit No: D3-22-4555-1998]

Reported by Usha Thiagarajah

H **JUDGMENT**

KN Segara JCA:

- I [1] The 1st and 2nd appellants herein appeal against the
decision of the judge in chambers dated 12 March 2003, reversing
the decision of the senior assistant registrar. The judge allowed the
respondent's O. 14 application with costs and entered judgment
in the sum of RM30,983,718.53 against the appellants.

[2] The 1st appellant (1st defendant) is a private limited company and the 2nd appellant (2nd defendant) is a director of the 1st defendant company. The respondent (plaintiff) is a co-operative society registered (or deemed registered) under the Co-Operative Societies Act 1993. A

[3] The 1st defendant is in liquidation since 5 October 2005 and was not represented in this appeal. We were informed by counsel that the Pegawai Insolvency was aware of the hearing but nevertheless was not present in court on behalf of the 1st defendant. We were also informed by counsel that no leave of court had been obtained by the 1st defendant, in compliance with s. 226(3) Companies Act 1965, to proceed with this appeal. In the circumstances, at the very outset, we ordered that the 1st defendant's appeal be struck off, with costs to be taxed and the deposit paid to respondent towards account of taxed costs. We then proceeded to hear the 2nd defendant's appeal on its merits. B C D

[4] Briefly, pursuant to the 1st defendant's request, the plaintiff agreed to grant to the 1st defendant an Al-Tarkhis (Revolving Credit) Facility under the Islamic banking principle of Bai Al-Inah in the amount of RM20,000,000 ("Facility"). The terms of the facility stated in the plaintiff's letter of offer dated 3 July 1997 was duly accepted by the 1st defendant on 9 July 1997. E

[5] The plaintiff asserted, that in accordance with the principle of Bai Al-Inah, the mechanism used in providing the facility was that the 1st defendant executed an asset sale agreement, dated 21 August 1997, whereby the plaintiff sold a property, known as HS(D)986, VIII District of Melaka Tengah Town Area, Melaka ("the asset"), to the 1st defendant, and the 1st defendant agreed to purchase from the plaintiff the asset, at an agreed sale price of RM32,500,000, subject to the terms and conditions as stipulated in the asset sale agreement. Simultaneously with the execution of the asset sale agreement, the 1st defendant executed the asset purchase agreement, dated 21 August 1997, whereby the 1st defendant agreed to resell the asset to the plaintiff, and the plaintiff agreed to purchase the asset from the 1st defendant, at an agreed price of RM20,000,000 ("purchase price"). The purchase price is the facility amount. F G H

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- A [6] Besides the asset sale agreement and the asset purchase agreement, the 1st defendant was also required to execute the Memorandum of Deposit of Shares and a Power of Attorney as security for the facility. Both were duly executed on 21 August 1997.
- B [7] The 2nd defendant, pursuant to a guarantee agreement, dated 21 August 1997, agreed to be the guarantor for the 1st defendant in respect of the sale price (RM32,000,000) under the asset sale agreement.
- C [8] The 1st defendant had committed an event of default by defaulting in the payment of the installments of the sale price as agreed under cl. 8.1(a) and Second Schedule of the asset sale agreement. The amount outstanding, as at 30 October 1998 was RM30,983,718.53 (made up of RM19,301,105.64 as the principal amount, being the monies disbursed under the facility, plus the “profit” of RM11,682,612.89).
- D [9] On 10 December 1998 the plaintiff filed a writ and statement of claim which was subsequently amended on 5 April 1999, claiming the sum of RM30,983,718.53. On 4 February 1999 the plaintiff filed an O. 14 application for summary judgment.
- E [10] We allowed the 2nd defendant’s appeal with costs here and below. The order of the High Court dated 12 March 2003 against the 2nd defendant is set aside. The 2nd defendant is to file his defence within 14 days hereof.
- F [11] We are of the view, upon a careful perusal of all the affidavits filed by the plaintiff and the 2nd defendant, that there are issues of both, fact and law, which warrant the case to go for trial. This is not a simple and obvious case for summary judgment under O. 14. There is a serious issue as to whether at the date the facility was granted to the 1st defendant in August 1997, the plaintiff could lawfully grant the Facility under Islamic banking principles when the plaintiff was a co-operative society registered or deemed registered under the Co-Operatives Societies Act 1993. This is a question of fact and law that can only be decided after witnesses have given evidence on behalf of the plaintiff as to its capacity in law to carry on Islamic banking business, in August 1997. These witnesses would probably include (i) the Chairman of the Board of Directors of the plaintiff who attended the meeting of the Board of Directors on 29 April 1993 where “Operasi Bank
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Mengikut Konsep Syariah” was discussed, and (ii) the Minister of Land and Co-operative Development who wrote the letter dated 4 December 2001 (more than eight years after the said board meeting) wherein he stated:

2. Dengan ini dimaklumkan bahawa saya:

2.1 membenarkan Bank Rakyat melaksanakan operasinya mengikut prinsip syariah seperti yang di luluskan oleh Lembaga Pengarah Bank Rakyat pada 29 April 1993; dan

2.2 ...

[12] Bank Kerjasama Rakyat Malaysia Berhad (Special Provisions) Act 1978 (Act 202) is an Act to make special provisions for the proper management and administration of the plaintiff. Under s. 2, Act 202,

“Bank” means the co-operative society known as the Bank Kerjasama Rakyat Malaysia Berhad

[13] Under s. 4(2), Act 202, the Board of Directors of the bank shall be responsible for carrying out the function and powers, and the general administration of the affairs and business of the bank. Section 14(1) Act 202, sets out the authorized business of the Bank. Section 14(1), Act 202 reads:

14(1) In addition to the powers, functions, duties, and responsibilities conferred or imposed on the Bank by the Ordinance, the rules made thereunder, and the bye-laws of the Bank, the Bank may:

- (a) make loans to, and stand guarantee for any loan of money to, any person, whether or not a member of the Bank;
- (b) grant and issue letters of credit to any person, whether or not a member of the Bank;
- (c) acquire, hold issue on commission, underwrite, and deal with stock, bonds, funds, obligations, securities, and investments of all kinds;
- (d) transact all manner of agency business;
- (e) acquire and undertake the whole or any part of the business of any person or company carrying on any business of the same nature as the Bank may lawfully carry on, or possessed of property suitable for the purposes of the Bank;

- A (f) maintain accounts with other banks in Malaysia;
- (g) carry on **other business expressly authorized** by the Minister with the **concurrence of the Minister of Finance**. (emphasis added)
- B [14] Islamic banking business would probably fall under s. 14(1)(g) above. The issues would then be:
- C (i) Had the Minister of Land and Co-operative Development obtained the concurrence of the Minister of Finance when he wrote the letter dated 4 December 2001, as the letter does not so state; and
- D (ii) is an authorization that is only expressed on 4 December 2001 sufficient to legitimize a transaction of the plaintiff executed in August 1997? Does it render the Islamic banking transaction with the defendants *ultra vires* the powers of the plaintiff and hence void and unenforceable?
- E [15] In *Lim Kar Bee v. Duofortis Properties (M) Sdn Bhd* [1992] 3 CLJ 1667; [1992] 1 CLJ (Rep) 173 the Supreme Court had occasion to observe:
- F Courts have always set their face against illegality in any contract. It is very well settled that the courts take judicial notice of such illegality and refuse to enforce the contract, and such judicial notice may be taken at any stage, either at the court of first instance or at the appellate stage irrespective of whether illegality is pleaded or not where the contract is *ex facie* illegal.
- G [16] The Development Financial Institutions Act 2002 (Act 618) came into operation on 15 February 2002 (P. U. (B) 51/2002). This Act shall apply to such financial institutions as may be prescribed by the Minister by order published in the Gazette (see s. 2(1) Act 618). Under the Development Financial Institutions (Prescribed Institutions) Order 2002, dated 15 February 2002 published in the Gazette (PU (A) 68/2002), the plaintiff was, *inter*
- H *alia*, one of the financial institutions listed in the schedule of the order. The plaintiff is thus also governed by Act 618 with effect from 15 February 2002, as a prescribed institution.

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[17] Under s. 3, Act 618 “bank” means Central Bank of Malaysia. Section 129(1), Act 618 clearly prohibits a prescribed institution from carrying on any Islamic banking business or Islamic financial business before obtaining the prior written approval of the Central Bank of Malaysia. For ease of reference s. 219, Act 618 is reproduced:

129(1) Nothing in this Act or the Islamic Banking Act 1983 (Act 276) shall prohibit or restrict any prescribed institution from carrying on Islamic banking business or Islamic financial business in addition to its existing business, provided that the prescribed institution shall obtain the prior written approval of the Bank before it carries on Islamic banking business or any Islamic financial business.

(2) For the avoidance of doubt, it is declared that a prescribed institution shall, in respect of the Islamic banking business or Islamic financial business carried on by it, be subject to the provisions of this Act.

(3) The Bank may, in consultation with the Syariah Advisory Council established under the Banking and Financial Institutions Act 1989, issue directions to a prescribed institution on matters relating to Islamic banking business or any other Islamic financial business and the prescribed institution shall comply with the written directions.

(4) The prescribed institution may, in carrying on Islamic banking business or Islamic financial business, seek the advice of the Syariah Advisory Council on the operations of such business in order to ensure that it does not involve any element which is not approved by the religion of Islam.

(5) For the purposes of this section:

(a) “Islamic banking business” has the same meaning assigned to it by the Islamic Banking Act 1983; and

(b) “Islamic financial business” means any Islamic financial business, the aims and operations of which do not involve any element which is not approved by the religion of Islam.

[18] It is patent from the above that there are serious issues to be tried. Even if the approval of the Minister of Land & Co-operative Development is accepted, a factual issue needs to be determined at a trial as to whether the approval was intended to

A be effective retrospectively. Thereafter, the question will arise as to whether such retrospective authorization would be lawful, in the face of statutory provisions governing the plaintiff as to when it can embark on Islamic banking business. There also needs to be determined whether the Board of Directors, at the meeting on
B 29 April 1993, specifically approved Islamic banking transactions by way of Al-Tarkhis (Bai Al-Inah). The minutes of the meeting produced seem to suggest the transactions approved were:

i) Bai Bithaman Ajil (BBA)

C II) Al Musyarahkah

III) Al Mudharabah

IV) Al Ijarah

D [19] What exactly was approved by the board is a matter of evidence to be adduced at the trial. We are unanimous that this is not a plain and obvious case that can be disposed off in a summary manner. There are serious issues of fact and law to be determined. The appeal of the 2nd defendant is allowed, with the
E consequential orders and directions already stated earlier in this judgment.

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